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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1046

CASPAR W. WEINBERGER, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,
Appellant,

v.

SANTIAGO DIAZ, JOSE A. CLARA, AND VICTOR CARLOS ESPINOSA,
Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of Florida

BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

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BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

STATEMENT OF INTEREST

This brief is filed with the consent of both parties herein.

The Association of Immigration and Nationality Lawyers is a national organization chartered under the laws of the State of New York. Its members are attorneys specializing in immigration, naturalization and nationality matters. Our interest in supporting the views of the opinion below prompts us to file this brief.

QUESTION PRESENTED

Whether 42 U.S.C. 1395o (1970) [Section 1836 of the Social Security Act] which authorizes enrollment in medical insurance coverage (including a substantial part of cost of physician's services, surgery, health care, diagnostic tests and medical appliances) by persons over 65 who are United States citizens and lawfully resident aliens for five years and excludes aliens lawfully here for periods under five years creates an unconstitutional discrimination violating equal protection as embodied in the due process clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in part that:

> "No person shall***be deprived of life, liberty or property without due process of law,***."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. 1395o (1970) (Section 1836 of the Social Security Act) provides:

> "Every individual who –
>
> (1) has attained the age of 65, and
>
> (2) (A) is a resident of the United States, is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, or (B) is entitled to hospital benefits under part A,
>
> is eligible to enroll in the insurance program established by this part."

STATEMENT

Appellees are Cuban refugees. Espinosa, age 73, was lawfully admitted for permanent residence in 1971. Diaz, age 77 and Clara, age 67, were lawfully admitted in 1971 as parolees and have not yet acquired permanent residence. They seek enrollment in medicare benefits under 42 U.S.C. 1395o (1970) [Section 1836 of the Social Security Act]. Diaz's and Clara's applications have been formally rejected. Espinosa's application will result in a similar action. Each appellee sought injunctive relief against the enforcement of the statute upon the ground that it violates equal protection. The three judge court below granted the requested relief and this direct appeal followed.

I

THE EQUAL PROTECTION CLAUSE PROHIBITS INVIDIOUS DISCRIMINATION AGAINST ALIENS

The Fourteenth Amendment guarantees equal protection to all persons within the jurisdiction of a state. 42 U.S.C.

1981 (1970), implementing the Amendment, insures all persons in every state "the full and equal benefit of all laws*** for the security of persons and property." These provisions:

> "embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory law." *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948).

They pledge to aliens the protection of equal laws. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Discriminations against aliens have been declared invidious and in violation of equal protection where a state restricted their right to operate a business, *Yick Wo v. Hopkins*, *supra*, their right to work, *Truax v. Raich*, 239 U.S. 33 (1915), or where commercial fishing licenses were denied, *Takahashi v. Fish and Game Commission*, *supra*.

However, a Cincinnati ordinance precluding aliens from conducting poolrooms where undesirables congregate has been upheld, *Clarke v. Deckebach*, 274 U.S. 392 (1927), and the denial of alien participation in public works projects has likewise been immune to attack. *Heim v. McCall*, 239 U.S. 175 (1915); but see *Purdy and Fitzpatrick v. California*, 79 Cal. Rptr. 77, 456 P.2d 654 (1969). Denial to aliens of the right to hunt and possess firearms for such purpose has also been upheld. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). The common law denial of the right of the right of aliens to hold land, originally sanctioned by this Court, *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Cockrill v. California*, 268 U.S. 258 (1924), has been called into question by *Oyama v. California*, 332 U.S. 633 (1948).

These early cases denying aliens participation in public works projects, in natural resources and the right to own land have been the subject of sharp criticism. See *Konvitz, The Alien and the Asiatic in American Law* (1946), Chapt. 5, The Right of Aliens to Own Land; Chapt. 6, The Right of Aliens to Work; Chapt. 7, The Right of Aliens to Share in Natural Resources.

Today, no alien is any longer racially ineligible for citizenship (8 U.S.C. 1422). The basis for discrimination against ineligible aliens in the California land laws no longer obtains. It is now considered odious and contrary to our national welfare to discriminate on the basis of race or national origin against persons in public accommodations or in federally financed assistance programs, 42 U.S.C. 2000(a)(1); 2000(d). Segregation in the utilization of our public educational facilities upon the basis of race or national origin violates equal protection. *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955); *McLauren v. Oklahoma*, 339 U.S. 637 (1950); *Gonzales v. Sheehy*, 96 F. Supp. 1004 (D. Ariz., 1951). Since 1945 we have subscribed to the United Nations Charter, 59 Stat. 1046, and in 1948 we sponsored the Universal Declaration of Human Rights which sought to ensure equal protection in employment and ownership of property regardless of national origin. (Articles 2, 7, 17, 23, Universal Declaration of Human Rights.)

In *Graham v. Richardson*, 403 U.S. 365 (1971) denial of welare benefits by Pennsylvania to aliens who failed to file a declaration of intention during a prescribed period and by Arizona to aliens who had less than fifteen years of residence were declared violative of equal protection.

Sugarman v. Dougall, 413 U.S. 634 (1973) ruled that exclusion of aliens by the New York Civil Service Law violated the Fourteenth Amendment's equal protection clause. *In Re Griffiths*, 413 U.S. 717 (1973) found a similar infirmity in the exclusion of aliens from permission to take Connecticut bar examinations.

These recent decisions reflect the present regard of this Court for the dignity of the individual and the equality of persons in our midst to the enjoyment of life.

II

THE DURATIONAL RESIDENCY REQUIREMENT FOR ALIENS FOR MEDICARE BENEFITS CREATES AN INVIDIOUS DISCRIMINATION

(A)

HISTORY OF SOCIAL SECURITY LAW

The Federal Social Security Act of 1935 (42 U.S.C. 301, *et seq.*, 49 Stat. 620) was part of a broad legislative program to counteract the depression of 1929. The hope behind the statute was to save men and women from the rigors of the poorhouse and the fear of such a fate. *Helvering v. Davis*, 301 U.S. 619 (1937). The Act recognized unemployment as a national problem and sought to solve it by the cooperative legislative efforts of state and national governments. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937).

Programs of retirement insurance, survivors insurance, disability insurance, hospital and medical insurance, unemployment insurance, public assistance, services for maternal

and child welfare, workmen's compensation, railroad retirement, veterans benefits and government employees retirement were adopted. The objectives of these federal-state programs were, *inter alia* "to keep individuals and families from destitution; to help them attain economic and personal independence; to keep families together; to give children the opportunity of growing up in health and security." *Social Security Handbook* (4th Ed. G.P.O.), p. 425.

In discussing the medicare benefits under the Social Security Act, the Social Security Handbook *supra*, p. 345 observes:

> "Most interested people will, upon reaching age 65, be residents of the U.S. and either citizens or lawfully admitted aliens who meet the length of residence requirements."

The statute, 42 U.S.C. 1395o (1970), [Section 1836 of the Social Security Act] requires citizenship or lawful permanent residence for five years to be eligible for medical insurance coverage which includes the cost of physician's services, surgery, health care, diagnostic tests and medical appliances. 42 U.S.C. 1395k, 1395x(m) and (s) (1970). One-half of this insurance program is financed by premiums paid by individuals 65 or older who choose to enroll. 42 U.S.C. 1395r(b) (1970). Excluded from eligibility are aliens lawfully admitted for permanent residence who have been here less than five years, as well as aliens lawfully admitted who claim political asylum (who are paroled into the United States) and have not yet acquired permanent residence status.

(B)

HISTORY OF FIVE-YEAR LAWFUL RESIDENCE REQUIREMENT OF NATURALIZATION LAWS

Our naturalization statute, 8 U.S.C. 1427 (1970), requires five years lawful residence as a prerequisite for naturalization for most persons. Those married to American citizens are eligible after three years. 8 U.S.C. 1430 (1970). Veterans are given special exemptions from the residence requirement, 8 U.S.C. 1439 (1970).

The original naturalization statute (Act of March 26, 1790, 1 Stat. 103) prescribed two years of lawful residence for naturalization. The Act of January 29, 1795 (1 Stat. 414) increased the period to five years. The Act of June 18, 1798 (1 Stat. 566) enacted during a period of restrictive legislation, enlarged the period to fourteen years. The Act of April 14, 1802 (2 Stat. 153) restored the qualifying period to five years and this has been retained in every subsequent revision of the naturalization laws [Act of March 3, 1813, 2 Stat. 809, 811; Act of June 26, 1848, 9 Stat. 240; Act of June 29, 1906, 34 Stat. 598; Nationality Act of 1940, 54 Stat. 1142; Immigration and Nationality Act of 1952; 8 U.S.C. 1427 (1970)].

It has been stated that:

> "The manifest purpose of such residence requirements has been to establish a period of probation during which the applicant might be enabled to learn our language, to familiarize himself with our language, customs and institutions, to shed foreign attachments, and to acquire attachments to the principles of our Constitution and government, to demonstrate ability to conduct himself as a law abiding

> citizen, and generally to prove his fitness to be accepted as a citizen of the United States." 2 *Gordon & Rosenfield, Immigration Law and Procedure*, pp. 15-14, 15-15 (1974).

Obviously, the five-year requirement of the Social Security Act was a requirement borrowed from the naturalization laws. But unlike naturalization, medicare requires no demonstration of good moral character, attachment, nor fitness to be a citizen.

(C)

THE UNCONSTITUTIONALITY OF THE DURATIONAL RESIDENCE REQUIREMENT

In *Graham v. Richardson*, 403 U.S. 365, 375, 376 (1971) this Court stated:

> "Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in Shapiro.
>
> * * *
>
> "Accordingly we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause."

Dunn v. Blumstein, 405 U.S. 330 (1972) found the Tennessee one year durational voting residence requirement an impermissible classification.

Shapiro v. Thompson, 394 U.S. 618, 627, 638, 641 (1969) involved, *inter alia*, the one-year durational residence welfare requirement of the District of Columbia. This Court ruled that:

> "The interests which appellant assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.
>
> * * *
>
> "Thus even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.
>
> * * *
>
> "The waiting-period in the District of Columbia involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due Process Clause of the Fifth Amendment."

Similiarly, it is clear that the discrimination between lawfully admitted aliens 65 years of age and over who have five years of residence and those who have not such length of residence is an irrational and unconstitutional classification which promote no compelling governmental interests.

CONCLUSION

For the reasons set forth herein, the judgment below should be affirmed.

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